Petition

Supreme Court, U.S.
FILED
MAR 20 1982
ALEXANDER L. STEVAS
CLERK

81-1745

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

-vs-

VALERIAN TRIFA,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

1. Where there is no quid pro quo which induces a party to consent to the entry of a judgment, from which he receives no benefit, and where the party is aggrieved by a ruling which underlies the judgment, may the party appeal the judgment and its underlying rulings?

2. Where the government knowingly delays the presentation of a denaturalization action for almost a quarter of a century after it learns of the critical facts of the case, and where the defendant undisputedly establishes prejudice, has the defendant been denied due process of law?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 622 F2d 447. A copy of the opinion appears in the Appendix hereto. The Order of the United States Court of Appeals for the Sixth Circuit denying Appellant's Motion for Rehearing is, as of this date, unreported. A copy of the Order also appears in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1). By order dated March 11, 1982, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 22, 1982.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision which the petition concerns is the Fifth Amendment to the United States Constitution which provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Statutory provisions which the petition concerns are, 8 USC 1451, which provide in its relevant parts as follows:

> **§ 1451. Revocation of naturalization — Concealment of material evidence; refusal to testify**
>
> (a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the

United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

STATEMENT OF THE CASE

This action is before this Court as a result of a complaint filed in the United States District Court for the Eastern District of Michigan seeking to revoke defendant's certificate of Naturalization, claiming fraudulent procurement.

The most Reverend Archbishop Valerian D. Trifa is the Primate of the Romanian Orthodox Episcopate of North America. Prior to his ordination to the clergy, and elevation to the rank and dignity of Archbishop in April, 1952, he was known by his given name, Viorel Dionise Trifa. Archbishop Trifa's name was legally changed from Viorel to Valerian at the time his United States citizenship was granted on May 17, 1957.

Viorel Dionise Trifa entered the United States as a displaced person on July 17, 1950. Prior to his entry to the United States, he had been investigated by the I.R.O. and the Displaced Persons Commission which determined that he was qualified to enter the United States as a displaced person. The Displaced Person Commission report and file became a permanent part of the Trifa Immigration and Naturalization Service file, making up Part 8 of 8 volumes of investigative materials and records kept by the INS on the defendant.

In August of 1950 an investigation of him was begun by the Immigration and Naturalization Service. By September of 1951, the F.B.I. began to participate in the investigation. The two services conducted independent investigations.

Approximately sixteen FBI reports were generated between 1951 and 1955, which provided two hundred and sixty three (263) individuals and other leads on the defendant's background and past. From those 263 individuals and leads, approximately 56 individuals were interviewed. Defendant, in the FBI reports between December 1951 and December 1955, was accused by witnesses of being a member of the legionary movement or Iron Guard in twelve separate reports; of being a fascist or Nazi in seven separate reports; of being anti-semitic, or having lied, in at least two separate reports; of being opposed to the interests of the United States in five separate reports; of being personally responsible for killing and other atrocities in nine separate reports.

The INS records show over 400 separate claims made to the INS by various witnesses, all of which came to the attention of the Government before defendant's admission to Citizenship in 1957.

At no time during the investigation did the FBI or INS attempt to obtain any information or documentation from the Government of Romania or the Romanian Patriarchate in Bucharest relative to defendant's background or the charges against him.

Defendant, was interviewed by the INS on at least two occasions. During the interviews, defendant told the interviewers that during the mid-1930's he had agreed with the policies of a Romanian political group charged in this lawsuit as being a front for the Iron Guard. Trifa also admitted being President of the National Romanian Christian Students Union, alleged to be a part of the Iron Guard. Bishop Trifa, in one interview, also admitted that he had advocated "Numerus Clausus," which he explained as proportional representation, but which the government charges was part of a pattern of persecution of Jews in Romania. Bishop Trifa also identified a newspaper article with a verbatim account of

a speech given by him on December 12, 1940 and stated that it reflected his general attachment to some of the ideals of Corneliu Codreanu, one of the leaders of the so-called Iron Guard. After explaining the particulars of the January 20, 1941 revolt, Trifa also indicated that he had considered himself a de facto member of the Legionary Movement, which the government charges is another name for the Iron Guard. Trifa also verified a copy of what has been called the "Trifa Manifesto," although he denied authoring the document.

In 1955, the Immigration and Naturalization Service closed its investigation of defendant. The reason for the INS action was stated in the July 11, 1955 memorandum of Oswald I. Kramer, Acting District Director, Detroit, Michigan, which reviewed both the INS and FBI investigations,

> Attached hereto is report of (name redacted) . . . which reflects that the investigation disclosed much information and some evidence regarding subject's membership and activities in the Iron Guard, and that subject denied under oath Iron Guard membership. As pointed out in this report, if subject had actually been a member of the Iron Guard, and this service had probative evidence to that effect, he was amenable to service proceedings . . . in that he was excludable at the time of his entry on July 17, 1950 . . .
>
> * * *
>
> No active investigation had been made by this service since the date of investigator Hayes' report. However, the FBI has been furnishing this service copies of their reports. The latest FBI report, dated May 10, 1955, reflects that the FBI investigation is still pending.

The Kramer memorandum had appended to it, ten documents relative to the allegations made against the defendant. It also reviewed several of the FBI reports. Summarizing the FBI report, Mr. Kramer discussed at length a three day FBI interview with the defendant.

> "Subject stated that he never formally became a card carrying member of the Iron Guard, although he wore the uniform on occasions and supported the ideas and joined in the movement, but he never became an official member because the Iron Guard card carrying group was very restricted and wanted as a student leader an individual who would be recognized by a large student group. He was accepted by the Iron Guard group because at that time he was president of a student group and sympathized with the ideas of the Iron Guard."

The interview also covered the events surrounding the issuance of the so-called Trifa Manifesto and the January 21, 1941 Bucharest uprising.

During the defendant's interview with the FBI, he had given the Bureau an original manuscript of the so-called "Trifa Manifesto." During the entire pendency of the litigation that crucial manuscript was never found, and its disappearance could not be explained by the Government until the Summer of 1980 when defendant and the Court were advised by plaintiff that an employee of the FBI had destroyed the document in 1974.

When the Bishop's petition for naturalization was first scheduled for final hearing in May of 1956, it was not called because the FBI had not concluded its investigation. Similarly, the petition was not called in November, 1956. Sometime in late April, 1957, the FBI advised Lorne Worthington, Chief of the Citizenship Section, that their investigation was

"terminated". Defendant's citizenship was granted on May 13, 1957.

Between 1957 and 1974 no branch of the United States Government investigated the defendant. During that time, numerous citizens, Congressmen and Senators, contacted the Service relative to defendant and the claims and charges made against him, and while many of those supplied documents, records and names to the Government, none of the leads were acted upon by the Service. At least thirty times between 1957 and 1974 INS officials wrote to those inquiring about the defendant, "Mr. Trifa's status has been carefully investigated by competent officers and nothing has been disclosed that would have sustained a deportation proceeding, or now that he is naturalized, a revocation proceeding."

On May 16, 1975, the Government filed its first complaint in this matter. Defendant responded with a Motion to Dismiss which was denied. Discovery was had thereafter.

Discovery revealed numerous documents in the possession of the Government which had only been obtained since the institution of the lawsuit. Most of these documents had been obtained from the National Archives where they had been in repose since 1945. Prior to 1978 the Government had made no attempt to obtain those documents or review them.

Independently of discovery, defendant had obtained directly from the Department of State a memorandum and reply written November 15, 1951, by Mr. Davilla who was a former Diplomat and the representative of the United States in Romania, concerning official misgivings about the defendant. Defendant also obtained a CIC report of January 16, 1950 identifying defendant as a member of a particular unit of the Legionary Movement. The document was created in Trieste, Italy, a few miles from the camp in Bagnoli, Italy, where defendant's displaced person application was proc-

essed. Defendant also obtained from government agencies, eight CIA reports dated March 6, 1950 (at a time when defendant was still in Europe), March 24, 1950, September 25, 1951, December 18, 1951, April 14, 1952, April 17, 1952, and one of unknown date. A second group of documents was received from the State Department and are dated August 6, 1951. All relate to allegations of Bishop Trifa's activities in Romania in the 1940's.

It was not until 1978, three years after the original complaint was filed that the United States Government made any attempt to contact the government of Romania, the government of Great Britain, and the Bundesarchives, in West Germany.

On June 1, 1979, defendant filed a motion for Summary Judgment. Defendant claimed that he had been denied due process of law in that the delay in bringing this action was willful and deliberate and had destroyed his ability to present a defense.

Defendant pointed out that he was unable to confront and/or produce witnesses by the fact that the government had redacted the names of many individuals who had been potential witnesses and had been contacted by the FBI and INS during the 1950's.

Additionally, defendant argued that he had been denied the opportunity to have evidence regarding his activities and statements incidental to his application for immigration based upon the testimony of people who participated in that process. It was defendant's contention that these witnesses could establish that statements attributed to defendant, were not made by him. Defendant reported that one of the case analysts who was involved in the processing of his file was alive but seriously infirm and it was questionable whether his testimony could be obtained. This inability to obtain his

testimony, the defendant alleged, was due to the delay caused solely by the plaintiff.

Defendant also claimed that the testimony of Messrs. Seeley and Jaremko, who interviewed him for the INS could shed important light on the circumstances surrounding the government's investigation of the defendant in 1951, and the government's knowledge of his background activities.

Defendant's motion further alleged that agents Gazan and Bowser of the FBI, who interviewed the defendant for three days in 1955, and to whom the defendant gave the manuscript of the "Manifesto" could have testified that the government had full knowledge of the defendant's background and history, and the decision to grant him his citizenship was not made out of ignorance or fraud.

The affidavit of defendant established that defendant was no longer able to accurately remember all of the events in issue in this lawsuit, some of which took place over forty years ago, and further, because of his age and health the hundreds of documents involved in the processing of this case had left his mind unclear as to what actually happened then.

The trial Court denied Defendant's Motion for Summary, stating that although the government had not met Defendant's specific allegations, documents and affidavits with affidavits and documents of its own, the assertion of the government's attorney at oral argument established questions of fact as to the necessity for delay by the government. The Court also held that the question of prejudice to the defendant, was a question that could only be resolved at trial.

On July 28, 1980 defendant signed and filed with the District Court a document entitled Surrender of Certificate of Naturalization and Supporting documents (Appendices A and B). These documents explained that the defendant was no longer physically, or financially able to contest the lawsuit

against him. Defendant has no personal financial resources, and therefore had to rely upon the financial resources of his episcopate to support his defense of this lawsuit. By mid 1980 the expenses had exceeded $100,000.00 and the episcopate could no longer bear the expense. Additionally, one of his parishes had been fire-bombed by persons claiming affiliation with the Jewish Defense League, and others had received threats of similar violence.

On September 3, 1980 defendant signed, approving as to form, a Judgment of Denaturalization.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT SHOULD REVIEW THIS CASE BECAUSE OF THE BROAD PUBLIC QUESTION INVOLVED

A. This Court Should Rule That Petitioner is Not Precluded From Appealing From the Final Judgment of the District Court by the Act of Consenting to the Form of the Judgment, From Which He Received No Benefit.

On November 3, 1981 a panel of the Sixth Circuit Court of Appeals, in a *per curiam* opinion affirmed the judgment of the United States District Court dated September 3, 1980 revoking Defendant's Certificate of Naturalization. Although the panel, sub silentio, rejected the government's argument that the District Court Judgment was a consent judgment, it held that Defendant could not appeal a final judgment "to the entry of which he consented."

Rejecting the claim that this was a consent judgment, then, the panel was in error in ruling that Defendant had no right to appeal.

In *Raceway Properties, Inc.* v. *Emprise Corporation*, (CA 6 1980) 613, F2d 656, appellee sought to dismiss Defendant's appeal, claiming that since Defendant had solicited the order dismissing his lawsuit, the order was not involuntary or adverse so as to allow an appeal. Plaintiff responded that the summary judgment ruling of the district court had placed him in a position where it was unable to proceed to trial, and therefore, despite Plaintiff's solicitation of the dismissal, the order was both involuntary and adverse. It was not in any way related to the relief Plaintiff had originally sought, and Plaintiff received no bargained-for benefit. Although the order of dismissal contained no reservation of Plaintiff's right to appeal the summary judgment ruling, the Court adopted Plaintiff's rationale, allowed Plaintiff to proceed with the appeal, and reviewed the underlying summary judgment order.

In the matter now before the court, the trial court ruled on a summary judgment motion in such a fashion as to lengthen what was already expected to be a two month trial, and to place a new burden of proof at trial upon the Defendant. The summary judgment ruling had, in effect, created a trial within a trial. Defendant found himself in a position where the financial resources of his episcopate, could not afford to maintain this lawsuit and its continuing, burdensome expense. Add to this the firebombing of his parish in New York by persons claiming affiliation with the Jewish Defense League, threats of violence and bombings to other parishes, the refusal of a suburban Miami community to allow a Romanian Orthodox Church of his episcopate to locate there, the interim suspension of his episcopate from the National Council of Churches and the threat of interminable litigation, the trial had been adjourned twice at the government's request,

and it becomes clear that Defendant's surrender of his citizenship certificate on August 25, 1980 was anything but voluntary.

Contemporaneously with this surrender, Defendant filed a statement. His counsel filed a 450 page manuscript explaining the defense view of the case, detailing what was lost to the defense, and how it was impossible to continue.

The government insisted that a formal judgment be entered. On September 3, 1980, the attorneys met and prepared a judgment, only the form of which was agreeable to all.

Approval as to form has never been seen as an adoption of the final result, so as to convert the judgment to one by consent, or to bar appeal. See, *Anno: Consent Judgment — Appellate Review*, 69 ALR 2d 755, 762; *Corpus Juris — Judgments* §333.

Like the Defendant in *Raceway Properties*, Defendant received no benefit from the entry of the judgment, not even the termination of the litigation, for it was clear that a deportation action would soon follow. Like *Raceway Properties*, the judgment here was 100% adverse. Like the judgment in *Raceway Properties*, this judgment contains no reservation of the right to appeal.

The Supreme Court has recognized similarities between denaturalization cases and criminal cases, *Berenyi* v. *United States*, 385 US 630. Despite the similarities, the courts have consistently held that an action for denaturalization is civil in nature, and extended none of the procedural safeguards of a criminal action to the denaturalization defendant, see *Roche, Statutory Denaturalization*, 13 U Pitt L. Rev So, the denaturalization Defendant is in a much worse position that the corresponding criminal defendant. A denaturalization defendant, finding himself without funds, has no right of ap-

pointed counsel, no right of compulsory process, no right of financial assistance from the government, and no *Brady* v. *Maryland*, (373 US 83) rights. A Defendant in a criminal case would not have to wait over five years from the filing of the complaint to go to trial. It is not Defendant's fault that he is unable to litigate interminably with the United States Government. How, then, can his abandonment of a factual defense, relying only on a legal defense, constitute consent or voluntary abandonment.

A criminal defendant who cannot, or will not, contest the charges against him/her, may still challenge, by appeal, the constitutionality of the action which brought him/her to the bar, *United States* v. *Heller* (6th Cir 1978), 579 F 2d 990, 992 N1. A citizen, from whom the government seeks to take that which one Court has described as "all that makes life worth living," ought to have the same protection in an action which has many of the trappings of a criminal proceeding, see e.g. *Klapprott* v. *United States*, 335 U.S. 601, 616-619 (Rutledge, J. Concurring); especially when the constitutional question is whether the willful actions of the government have stripped him of the ability to protect that cherished citizenship.

While not advocating extending full criminal procedure to the denaturalization case, recent commentators have suggested that the denaturalization action, as now constituted, deprives the Defendant of procedural due process, see *Comment — Denaturalization of Nazi War Criminals: Is There Sufficient Justice For Those Who Would Not Dispense Justice*, 40 Md L. Rev 39 41 (1981).[1] In the matter before the

[1] This suggestion is especially remarkable in that the author of the *Comment* acknowledges the contributions of four of the Defendant's attorneys, including former Deputy Director Mendelsohn and Mr. Rosenbaum, one of the authors of Plaintiff's brief in the Sixth Circuit.

Court, the delay and unequal resources leave open the possibility that if this Court adopts the position of the Sixth Circuit, the lack of procedural due process will have deprived Defendant of an opportunity to have his substantive due process claim heard.

When the claim is, as here, that the government's own records show, without dispute or doubt that the government with full knowledge of the facts, willfully avoided bringing an action for some thirty (30) years, until it rendered Archbishop Trifa unable to defend himself, it is inconceivable that the criminal defendant should be in a better position to present that claim. The criminal defendant's incarceration will probably end one day, the denaturalized Defendant's loss of citizenship will not.

II.

THE SUBSTANTIVE ISSUE PRESENTED RAISES A SUBSTANTIAL FEDERAL QUESTION UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION WHICH SHOULD BE REVIEWED.

A. The Deliberate, Reckless Conduct of the United States Government in Intentionally Delaying Bringing this Action for Twenty Four (24) Years has Deprived Petitioner Due Process of Law.

The starting point for all modern discussions of the subject of pre-accusation delay and denial of due process is *United States* v. *Marion*, 404 US 307, 92 S.Ct. 455, 30 LEd 2d 468. In *Marion*, the court noted that the primary protection against prejudicial delays and prosecution, statutes of limitations, do

not fully define the defendant's rights. There, the United States conceded, and the Supreme Court agreed that:

> . . . the due process clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellee's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. 404 US at 324.

The Courts have never held, however, that only intentional delays to gain advantage over the accused would require dismissal as violating the basic concepts of due process.

> The protection afforded by the due process clause has not, in general, been held to demand intentional misconduct on the part of the government before it is applied. . . . Indeed, the court in *Marion* stated that it was not making any absolute test in this regard and left it open to the courts to make their own judgments so long as they would be consistent with the reasoning in *Marion*. *United States* v. *Mays* (CA9 1977) 549 F2d 670, 676-677.

The *Mays* court then went on to indicate its preference for an approach that balanced all the factors. First, *Mays* requires some demonstration of actual prejudice resulting from the delay. To establish actual prejudice, defendant must show not only the loss of witnesses and/or evidence, but how that loss prejudiced his ability to present a defense. The court must also weight the length of the delay, and the reason for the delay. In addition, the court found that negligent delay could be considered by the court in the weighing and the balancing of the various factors. 549 F2d at 768.

While the 9th Circuit was hammering out the balancing test in *Mays*, this Court was suggesting that the task before

them was to determine whether compelling a defendant to stand trial after governmental delay violated those "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *United States* v. *Lovasco*, (1977) 431 US 783, 790. In doing so, the court expanded our horizons of what would constitute such a violation.

> In Marion we noted with approval that the government conceded that a "tactical" delay would violate the due process clause. The government renews that concession here, Brief for United States 32, and expands it somewhat by stating:
>
> "A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." 425 US 795, n17.

It is exactly this kind of reckless delay which the defendant has urged as being violative of his Fifth Amendment Right to Due Process.

The operative facts in this case, which the government concedes are still a "disputed history", were already between ten and thirteen years old when the government began its investigation. The operative, disputed facts in this case were seventeen to twenty years old when the government ceased its investigation and granted the defendant citizenship in 1957. The disputed facts in this case were thirty-five to forty years old before the government sought to initiate this prosecution.

There can be no question that the *refusal* of the government to act was in reckless disregard of circumstances known to the prosecution suggesting that there existed an ap-

preciable risk that delay would impair the ability to mount an effective defense. The underlying, operative facts in this case are, and have always been in dispute. They involve claims that speeches defendant made caused violent acts at which he was not present. They involve questions about the interrelationships and nature of political and social organizations. They involve questions of how organizations were organized. They involve questions of what was meant by a particular person when he said a particular thing.

All of these things happened halfway around the world. All of the individuals who could give first hand, "best evidence" on these questions were already mature adults when the events happened, ten years before they came to the government's attention. At the time that the matter first came to the government's attention, there was already an appreciable risk that delay would cause a loss of people, a reduction in the likelihood that a trial would produce the truth.

During the period of time that defendant remained in the United States as a resident alien, the burden always remained on the defendant to establish his valid entry into the United States, §23, Act of 1924, 8 USC, §221, and his right to remain in the United States, *Vlisides* v. *Holland*, (E.D. Pa 1957) 150 F.Supp 678. Prior to his naturalization, defendant also bore the burden of establishing that he satisfied all the requirements for citizenship. *United States* v. *McIntosh*, (1930) 283 US 605.

Substantial questions had been raised about appellant's eligibility for residency, much less citizenship, and had the government chosen to it could have deferred the question of citizenship until a time when it was satisfied beyond any doubt that defendant was entitled to citizenship. Despite the admissions of defendant, and statements of witnesses, alleging that he was responsible for the persecution of Jews and others in Romania, defendant was granted citizenship. Between 1950

and 1955 the government was conducting an active investigation. Witnesses were interviewed, documents and photographs were reviewed and prosecutorial decisions were being made.

The decision to grant citizenship was made based upon the independent investigations of the government agencies involved, not the representations of the defendant.

After the defendant's naturalization, however, the burden of proof shifted. Once the defendant was naturalized, the burden on the government was to prove by clear and convincing evidence that citizenship was procured by "concealment of the material fact or by willful misrepresentation." *Nowak* v *United States*, 356 US 660.

This new burden did not cause any delay in the investigation and presentation of this matter.

In *Lovasco*, this Court acknowledged several acceptable justifications for delayed prosecution. Prosecutors may delay prosecution until they are satisfied they will be able to establish the suspect's guilt. Prosecutor may also delay to continue an investigation in order to bring other participants in the transaction to justice. Lastly, the prosecution can delay to make a determination whether or not to prosecute regardless of any present proof of the accused's guilt, 431 US at 790-794.

The record discloses an utter failure by the government to meet any of these acceptable reasons for pre-accusation delay. From 1957 to 1974, not a single investigatory report was added by either INS or the FBI. The INS did, however, manage to generate approximately thirty-three letters telling various pursuers how thorough, how complete, and how extensive the original investigation was. Witness the letter from A.J. Salturelli, District Director INS, to David Horowitz, Editor, World Union Press, April 5, 1973:

> Subsequent to Bishop Trifa's entry into the United States, charges against him similar to the ones advanced in your letter (were) received by this service. An extensive investigation of all such charges was thereafter conducted over a period of years . . . all avenues of inquiry into the charges brought against him were thoroughly explored . . . after Bishop Trifa's naturalization this Service again considered every scrap of information and evidence in his case . . . the evidence and information considered is the same as related in your letter. If you are able to present any testimony or evidence, other than related in your letter, to substantiate the charges made, this service will take the necessary steps to initiate revocation proceedings.

Such a letter, which is repeated several times throughout the eight volumes, is hardly indicative of an active, ongoing investigation.

To further belie any claim of necessary delay to facilitate investigation, one has only to look at the information and evidence that was generated by the government since 1978, three years *after* the original complaint was filed. Virtually all of the four hundred plus discovery exhibits generated in this case were obtained after 1978. Between 1978 and 1979, the Department of Justice was able to obtain records from the National Archives, the government of Great Britain, the Bundesarchives in West Germany and Israel.

Having established willful, impermissible delay, the defendant has also established actual prejudice.

> To establish actual prejudice sufficient to warrant a dismissal, the defendant must show not only the loss of the witness and/or evidence, but also just (sic) demonstrate how that loss is prejudicial to him. (Citations omitted).

The Supreme Court has given no guidelines as to what constitues "actual prejudice." In its only published opinion on the subject, the Sixth Circuit indicated that it would at least require that the defendant show that the lost evidence would have been related to the offense charged, *United States* v *Swainson*, (CA6, 1977) 548 F2d 657.

Appellant has met every conceivable standard. Defendant filed with the court an affidavit indicating that because of his age, and the passage of what is literally a lifetime, his memory has become sketchy or has failed him completely as to some events. Further, defendant indicated that the sheer volume of information presented to him by the government, numbering hundreds of thousands of writings and documents have confused his mental state even further. Defendant detailed the names of some of the individuals who had become inaccessible to him by death or infirmity, indicating precisely what their testimony would have been expected to establish and establishing how that testimony would have affected the issues of this lawsuit. Defendant also provided for the court, in some cases, when these individuals died, further establishing with specificity how the delay prejudiced him.

At the time of oral argument, defendant offered, in a most dramatic form, evidence of how governmental delay caused him substantial prejudice. In 1975, defendant was able to locate several senior officials of the Romanian Government, and the Romanian Legionary Movement of the late "30's and early 40's, living in Spain. Although they were, each and every one of them, of advance age and infirm, defendant was able to obtain permission to take their depositions. By order of the Court, and agreement of counsel, the depositions were tape recorded and later transcribed by the Court's reporter. The audio-cassette tapes of those depositions were not, however, destroyed. They were preserved. At the time of oral argument Mr. George Woods, counsel for defendant, played for the

Court a portion of the testimony of Vasile Iasinschi. Mr. Iasinschi, second highest member of the National Legionary State, was eighty-nine (89) years old at the time of the taking of his deposition. Through the audio cassette tape, the Court was able to hear for itself the toll the years had taken on this potential witness. The Court was able to hear how haltingly he spoke, how enfeebled his voice was, the difficulty he had speaking and understanding what was going on. The government never contested defendant's claim that that testimony was irreplacable, that the years had cost in terms of Mr. Iasinschi's memory, or that defendant was prejudiced by this loss. The government never contended that it had attempted to find Mr. Iasinschi or had been prevented from finding Mr. Iasinschi by anything the defendant, or Mr. Iasinschi did. The audio-cassette tape was more than ample proof of the prejudice resulting to the defendant.

At the time of oral argument, Judge Kennedy specifically requested that defense counsel provide her with a cross referencing of the names of witnesses set forth as lost by the defendant and how their testimony related to the record as it had been developed and as it would be presented. Counsel filed a supplement with the Court, showing the cross referencing of at least eleven of the witnesses whose testimony had been lost to the defendant, listing where that individual was mentioned in the record.

Lastly, plaintiff suggests that the only time defendant should be heard on this question is at trial, citing ***United States*** v ***Marion***, 404 US 307. In Marion the Court said, "[T]he question whether pre-indictment delay violates due process of law cannot ordinarily be considered apart from the factual development at trial since normally only the '[e]vent of the trial [can demonstrate] actual prejudice'." *id* at 324. ***Marion*** did not lay down an immutable rule that the matter could only be raised at trial. Witness the use of "ordinarily"

and "normally". Witness also the flexible approach to the whole question of due process by the *Marion* Court.

Where, as here, the question arises in a civil context, where discovery has made the facts clear, the need to wait for trial to see the "factual development" is less important, because the pretrial proceedings, as well as discovery material, put the trial court in a position to evaluate actual prejudice. Indeed, in a lengthy, complex, civil case such as this one, delaying the due process question to the time of trial, would only serve to make a lengthy, complex, piece of litigation more lengthy, and more complex. Such a requirement would make no sense logically or legally. The purpose of pretrial proceedings is to narrow and simplify the trial, not to lengthen and further confuse it. Civil cases, with wide open discovery, present a different framework than criminal cases. While deferring until trial in a criminal case is very logical, the ready availability of proof in a civil case makes that deferral unnecessary.

CONCLUSION

> "Clearly a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is "Purposeful or oppressive," in unjustifiable ... The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin ... Thus the *crucial question* in determining the legitimacy of governmental delay *may be whether it might reasonably have been avoided — whether it was unnecessary*. To determine the necessity for governmental delay, it would seem important to consider on the one hand the intrinsic reason for the delay and its potential for prejudice to interest protected by the speedy trial safe guards." *Dickey v. Florida* 398 US 30, at 51-52 (Mr. Justice Brennan Concurring).

Dickey v. Florida, was a speedy trial case, but the statements and the rationale of Mr. Justice Brennan serve to focus the search in this case. In the case at bar, the plaintiff has not justified the delay of 18-25 years in bringing this action.

Defendant has amply demonstrated prejudice.

Unlike the average criminal case, a denaturalization action, while having some criminal characteristics, is a civil action, requiring the defendant to present proofs to rebut those produced by the plaintiff.

> "If the case for the prosecution calls on the accused to meet charges, rather than rest on infirmaties in the prosecutions case ... the time to meet them is when the case is fresh. State claims have never been favored by the law ..." *Dickey v. Florida*, supra, at 37.

Plaintiff's claim in this lawsuit is anything but fresh. The operative facts are now in excess of forty years old and are still in dispute. If due process is to mean anything as a tool to balance the inherent power inequalities between the sovereign and the governed, this Court must recognize this case for the gross deprivation of due process that it is, reverse the judgment for the plaintiff, and order Summary Judgment entered on behalf of the defendant. The petition for a writ of certiorari should be granted.

Respectfully submitted:

WILLIAM W. SWOR
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Appendix

APPENDIX A

STATEMENT OF BISHOP TRIFA

On August 25, 1980, my legal counsel was instructed to file a surrender of my Certificate of Naturalization with the United States District Court for the Eastern District of Michigan at Detroit, Michigan. Attached to such pleading was a memorandum or commentary, actually in book form, which in some measure attempts an analysis of the whole history of the times, places and events leading to this most unhappy day of my life.

The relinquishment of my citizenship is in no way to be considered an admission of the government allegations in any manner, form or substance. Indeed, my protests in this regard have remained unequivocal these past thirty years.

This litigation against me has actually been enlarged into something far more comprehensive — a trial of the ideological and political milieu of Romanian history in the pre-war years, nearly 50 years ago. To that obvious purpose and direction, I have been made a hostage of my own naturalization, forced to act as a vehicle in the condemnation of my country of origin; and, particularly of the Legionary Movement of those years, and of the many fine men and women who gave so much in their dedication to what was then felt as the best solution to Romania's many and complex difficulties. This I cannot and I will not permit to continue.

However much I believe in the American judicial process — and I do — it is with an equally firm conviction I feel I have been denied due process in this protracted litigation. Even if I were accorded a fair trial as such in a procedural sense, it would appear to be irrelevant when such would still render impossible any attempt to bring across the truth of the mat-

ters taking place in Romania during the critical years between the great wars.

The tremendous cost, the enormous amount of time, the heavy burdens of many years of litigation and harassment have rendered me unable to effectively defend myself and give full measure to the parishioners of my far-flung Episcopate. Of late and increasing importance, I find myself unable to act or speak freely on behalf of my Church. Even avenues of religious and political expression appear to be closed to me.

The priorities are clear. If the Romanian Orthodox Episcopate of America is to survive and remain free, outside interests and influences cannot be permitted to transform my fight to retain U.S. citizenship into a power struggle between my Church, my American government and my country of origin.

Thus, in order to preserve the integrity of my own convictions, and in the best interests of my Church and its faithful, the struggle must end!

APPENDIX B

Summer, 1980

By the date of this commentary, the pursuit of Bishop Trifa in the denaturalization proceeding was over . . . for the defendant had voluntarily surrendered his Certificate of Naturalization to the United States District Court for the Eastern District of Michigan.

. . . And why did it end in this manner — why, with all of the time, all of the effort, the years of frustration and heartache . . .

The fight for survival first began in the resistance to the pressures of the Rumanian Communist Government nearly 30 years ago in its attempts to take control of the Rumanian Orthodox Church in this country. Those in any way knowledgeable with the history* of the Church are keenly aware such struggle has continued to this very day — and a mere recapitulation of the effort and sacrifice over the years in order to survive in no way can demonstrate the toll taken of this man both physically and mentally.

From the very beginning there were the charges of " . . . war criminal . . . Nazi . . . Fascist . . . Communist . . . atrocities . . . " And those endless allegations, of course, initiated a continuing investigation of the defendant, one in which the government has conveniently neglected to acknowledge Trifa's cooperation whenever called upon. The first seven years of the investigation have been detailed at great length in early chapters of this book — but the regularity and intensity of it has varied but little even to the date of this writing.

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* Recommended reading Bobango, *The Romanian Orthodox Episcopate of America, 1929-1979.*

Indeed, there is considerable reason to believe the Immigration and Naturalization Service will continue to "investigate" the Bishop for whatever time is left to him. After all, it would not be the first time our government has engaged in relentless pursuit after having been the cause of its own profound embarrassment...

This is a man who has never denied his wholehearted support of the nationalistically-oriented Legionary Movement. At that time and in that setting he had a genuine belief it represented the ideals and the best — perhaps the last hope for the Rumanian nation and its people in those chaotic circumstances.

Admittedly an activist for social justice in a country which admitted of little if any — and permitted far less — Trifa dedicated his time and effort to the only student organization capable of waging an incessant battle for basic human rights and an opportunity to move into the mainstream of social, political and economic responsibility. Yet in his activism, in his battle, he has always denied having committed crimes against individuals or against humanity as any means to an end.

One could hardly deny he was verbal and critical of what he and so many others felt was the undue influence of Rumanian Jews in the political and economic national fabric. Even though the Jew was the principal object of his views on *numerus clausus* and proportional representation, his views on what we might call "ethnic exclusivity", he could never have believed at the time, or now, such opinions or attitudes were or are persecutive of another in the context attributed by the denaturalization case against him. — If so, there must be a considerable number of naturalized citizens from Central and Eastern Europe, and elsewhere, who are in for a considerable shock...

Nor was there ever the slightest whisper by Trifa of a race or religious hatred — and his strong belief in advocating *numerus clausus* at the time has never been a matter of any inconsistency to him, no different in fact than the proponents of affirmative action feel when they deny they are imposing "reverse discrimination" on others.

He has maintained from the beginning his position as the President of the National Union of Rumanian Christian Students made him the spokesman and leader of all of the students. Christian, Jew or otherwise — made him the representative and administrator of the rights of all Rumanian students in their problems and negotiations with the government.

However reluctantly he agreed to the assemblage, Trifa always acknowledged he was a leader of the demonstration in Bucharest on the night of January 20, 1941. And finally, after changing its mind in a succession of pleadings in the case, even the government could be seen to have arrived at a point where it tacitly admitted the evening resulted in a peaceful manifestation of a protest of what many claim was a unilateral, unlawful and arbitrary act by General Antonescu.

As for Bishop Trifa, he was not involved in the persecution of the Jews or in the torture and killing of Christian and Jewish victims of the events of January 21-24, 1941. What further or other really need be said at this point; it seems to have been said in so many ways, however inexhaustible the subject matter.

And after those tragic and horrible few days, Trifa was, as we know, given initial and then continuing sanctuary by the Germans after the fall of the National Legionary State government. Along with many Legionares and supporters of the movement, he was taken to Germany under armed guard and thereafter kept in a protective custody status. Most

assuredly his detention was not in the manner of those many thousands of other prisoners in German concentration and extermination camps who suffered all nature of brutality and death — but he was, nonetheless, kept in prison for well over three years, albeit there were privileges enough a share of the time to insure survival.

He was released eventually, in August, 1944, found his way to Italy — after rejecting Sima's National Legionary State in Exile — and ultimately came to the United States on July 17, 1950.

For a considerable period of time prior to the writing of this epilogue, it became abundantly clear to defense counsel the defendant was "slipping away"...His over-all health and vigor had diminished to an extent it gave me great concern — equally alarming, he had lost his will and power to carry-on the fight. The heart, the stamina — they were faint and near-impossible of being able to go on any longer in the defense of the action brought by the government.

The 30 years of investigation and vilification finally seemed to catch up and take all the heart out of him — although there was a bit more to it than that, of course. The initial Complaint had been filed against him in May, 1975 — and though the government from the beginning was supposed to have "well-documented material" and evidence against him, it always seemed the government was forever changing lawyers, time and again — or they were asking for additional time to get more "well-documented material". Their "do over" against him seemed endless...

At one point, in October, 1977, it appeared we might be ready to try the matter and get it over and done with...but it didn't quite work out that way...

By mid May, 1980, we had yet *another* judge assigned to try the case — completely unfamiliar with the matter and its five

year litigation complexities, of course — and only a fair hope of concluding the case at the trial level by year's end . . . to be followed by the interminable time and cost of an appeal . . .

Defendant has never had the economic means to engage in litigation with the government — a bottomless pit — or with anyone else. He has had the goodwill of his parishioners for contributions — and that is all. Already more than five years along into this complex litigation, an honest response to, "How long?" — '. . . well, it could take a very long time — and a bundle of money . . .'

To the rest of you who would do combat with your sovereign state or Federal government, take note that at the date of this writing the defendant had spent well over $100,000 in an attempt to defend himself — every cent of which had come in small and individual contributions from members of the diocese. — The last we heard, the special government unit was prepared to fight with over five million of the taxpayer's money while the defendant fought with only his own, something approximating slim and none.

So there is no more money at this point — though you are probably correct to suggest he could go back to the members of his episcopate. But then, he concludes, it gets to be a matter of priorities: how long can he go to these people who not only have their own financial problems in those times of high costs and escalating inflation — but what is to be done to get the tens of thousands of dollars necessary to assure continuance of the summer camps for the youth of the Church who must have new — and expensive — dormitories? — And however legal counsel might believe he had more than a fighting chance for success in the lawsuit, how does one make too much headway in the fact of those practical considerations?

. It has never been easy finding witnesses and evidence these 40 years later — nor has it been inexpensive. For have you tried traveling in Europe or South America, particularly in the past two years?

When this matter could have been brought, it wasn't. — It would have been so much easier, and for both sides to this proceeding...

The defendant will always be convinced — and so will others — he has been denied due process by the delay in the prosecution of this case. Nor is he persuaded he would ever be able to make anything near the presentation of his case necessary before he would get his "fighting chance". — Perhaps he's right on that one...

Between the adjournment the government was given in July, 1979, — and Trifa's discovery he was back in the game again as a pawn to be checkmated by the Socialist Republic of Rumania over his determination to fight for the independence of his Episcopate — well, he gave up in his long and frustrating fight to free himself of being prisoner of his Certificate of Naturalization.

It has weighed heavily on his mind that he has been drained of both time and energy to minister to his far-flung parishes these past years. In the best of times, as your own leader of worship will tell you, it is a grim and constant challenge to survive. His loss of ability to express himself on behalf of his Church, his loss of over-all utility, it is believed, also contributed to the Bishop's final decision in the matter.

The media, of course, has "done a job" on him over the years — all of which has subjected him to harassment difficult for anyone else to imagine. And it has extended as well to his churches throughout the country: picketing, disturbances — firebombing — building permits being denied local parishes because their Bishop is a "Nazi", or the church is a nest of the same...

Maybe, too, there might be some feeling his 30 years as a fine citizen and outstanding churchman seem to have been disregarded; his citizenship has been held hostage by the government all that time. . . maybe if they do not want him to have it anymore, then why is it so important to place all that much value on a certificate whose meaning has been eroded by a government he feels has made a mockery of simple fairness.

For him, it has certainly been, The Undoing. . .

George E. Woods

August, 1980

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Judge Horace Gilmore
Civil No. 5-70924

VALERIAN TRIFA, a/k/a
VIOREL TRIFA,
Defendant.

JUDGMENT

The plaintiff, having filed its complaint herein on May 16, 1975, and having filed an amended complaint on July 12, 1978, and defendant having answered the complaint on August 14, 1978, and the parties having engaged in mutual discovery, and the defendant having, on August 25, 1980, voluntarily surrendered his Certificate of Naturalization No. 7119787 to the United States Attorney and having represented to this Court that although he does not admit the allegations contained in the complaint and Affidavit of Cause, he will not contest this action, and consents to the entry of this Judgment, and this Court being fully advised in the premises and having determined that the Court has jurisdiction over the subject matter of this action and of the parties hereto, it is

ORDERED, ADJUDGED, and DECREED that final judgment in favor of the plaintiff and against the defendant is

hereby granted, pursuant to Section 348(a) of the Immigration and Nationality Act of 1952, 8 U.S.C., Section 1451(a); and, it is further

ORDERED, ADJUDGED, and DECREED that the defendant Valerian Trifa, a/k/a Viorel Trifa, was not and is not a duly naturalized citizen of the United States, and that he is not entitled to any of the rights, privileges, or immunities of such citizenship, and, it is further

ORDERED, ADJUDGED and DECREED that the order of the Circuit Court of Jackson County, at Jackson, Michigan, dated May 13, 1957, admitting the defendant Valerian Trifa to United States citizenship is hereby declared null and void and the Clerk of this Court is directed to transmit a certified copy of this Judgment to the Clerk of the Circuit Court of Jackson County, at Jackson, Michigan, so that the records of the said Court shall reflect this Judgment, and, it is further

ORDERED, ADJUDGED, and DECREED that Certificate of Naturalization No. 7119787 is hereby cancelled and set aside and the Clerk of this Court is directed to transmit the said Certificate to the Director of the Immigration and Naturalization Service, Department of Justice, or his representative, for disposition pursuant to the established procedures of the Immigration and Naturalization Services; and, it is further

ORDERED, ADJUDGED, and DECREED that the defendant Valerian Trifa is hereby directed to surrender his United States passport to the United States Attorney.

HORACE GILMORE
United States District Judge

SEPTEMBER 3, 1980

Date

Seen and approved as to form:

UNITED STATES OF AMERICA

By: /s/ _____
Attorney for Plaintiff

/s/ _____
Attorney for Plaintiff

/s/ _____
Attorney for Plaintiff

UNITED STATES DEPARTMENT
OF JUSTICE
OFFICE OF SPECIAL INVESTIGATIONS

_____

JAMES K. ROBINSON
United States Attorney
Eastern District of Michigan

DEFENDANT

By: /s/ _____
Attorney for Defendant

/s/ _____
Attorney for Defendant

/s/ _____
Attorney for Defendant

/s/ _____
VALERIAN TRIFA
Defendant

APPENDIX D

No. 80-1762

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VALERIAN TRIFA,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed November 3, 1981.

Before: WEICK and JONES, Circuit Judges and PHILLIPS, Senior Circuit Judge.

PER CURIAM. Defendant-Appellant Trifa has appealed to this court from a judgment of the district court in an action by the government seeking denaturalization under 8 U.S.C. § 1451(a) which expressly recites that it was entered into by consent, and was signed by Trifa, his attorneys, and the attorney representing the government, which judgment revoked Trifa's citizenship on the ground that he had procured his citizenship illegally and through misrepresentation of material facts. He had previously on August 25, 1980, surrendered his citizenship.

In his appeal which recites it is from the judgment entered by consent, Trifa does not contend that the judgment was entered without his consent or that he and his attorneys did not know what they were doing. He seeks to rely on previous proceedings in the same case before District Judge Kennedy in

which he moved for summary judgment on the ground that 8 U.S.C. § 1451 is unconstitutionally vague and infringes on First Amendment freedoms; that the government's delay of 25 years since his entry into this country and 18 years since his naturalization before bringing the present action was a denial of due process.

District Judge Kennedy denied Trifa's motion for summary judgment holding that the statute was not unconstitutionally vague and does not violate the First Amendment; that there is no laches defense to a denaturalization suit; that the Sixth Amendment does not apply to pre-indictment or pre-accusation delay; that there were genuine issues of fact which could only be determined at a trial. Judge Kennedy further denied Trifa's request to certify the order denying his motion for summary judgment to this court for an interlocutory appeal.

The case was then transferred to District Judge Gilmore upon Judge Kennedy's elevation to this court. In proceedings before Judge Gilmore, the consent decree was submitted to him for approval and he signed it and entered judgment the same day in favor of the United States revoking Trifa's naturalization.

In this appeal, Trifa seeks to raise the same issues previously presented to Judge Kennedy, but they are no longer appealable because Trifa has surrendered his citizenship pursuant to a valid decree to the entry of which he consented. He does not claim that either he or his attorneys were under any disability when they signed the decree.

Reliance on *Raceway Properties, Inc.* v. *Emprise Corp.*, 613 F. 2d 656 (6th Cir. 1980), and similar cases not involving consent decrees is inappropriate.

The judgment of the District Court is affirmed.

APPENDIX E

No. 80-176

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America
Plaintiff-Appellee

v. ORDER

Valerian D. Trifa
Defendant-Appellant

Before WEICK and JONES, Circuit Judges and PHILLIPS, Senior Circuit Judge.

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF
THE COURT

/s/ _____
Clerk

Opposition

Office-Supreme Court, U.S.
FILED
APR 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1745

In the Supreme Court of the United States

OCTOBER TERM, 1981

VALERIAN TRIFA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1745

VALERIAN TRIFA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. The United States filed this action in the United States District Court for the Eastern District of Michigan in 1975, seeking to revoke petitioner's naturalization under 8 U.S.C. 1451(a). The gravamen of the complaint was that petitioner had procured his citizenship illegally and through willful misrepresentation of material facts because, upon his entry to the United States in 1950 and again upon his application for citizenship in 1957, he had concealed from United States authorities his role as a pro-Nazi leader in Romania prior to and during World War II.

Petitioner moved for summary judgment, alleging, *inter alia*, that the United States had denied him due process by waiting too long to file suit. On October 30, 1979, the district court denied the motion (C.A. App. 16-31).[1] The

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[1] "C.A. App." refers to the appendix in the court of appeals.

court found that "the government * * * has not been shown to have caused delay pursuant to a plan to prejudice the defendant" (C.A. App. 27). Moreover, the court explained that "[b]oth the reasons for the government's delay as well as the prejudice to [petitioner] are in dispute" (*ibid.*) and that "the appropriate time to consider prejudice to due process rights is at trial" (*id.* at 28).

Shortly before the trial was to take place, petitioner, without any previous discussion with the government, surrendered his certificate of naturalization to the United States Attorney on August 25, 1980. The government then met with petitioner's counsel and agreed upon a consent judgment (Pet. App. 10a-12a) granting "final judgment in favor of [the government] and against the [petitioner]" (*id.* at 10a) and revoking petitioner's naturalization. At a hearing prior to entry of the judgment, the district court stated that the judgment "totally disposes of this case" and petitioner's attorney agreed (C.A. App. 478). The consent judgment was entered on September 3, 1980.

Petitioner appealed, claiming that the district court had erred in denying his motion for summary judgment. He did not claim that his consent to entry of final judgment was invalid (see Pet. App. 13a; see also C.A. App. 488, 492).[2]

The court of appeals affirmed (Pet. App. 13a-14a; 662 F. 2d 447 (1981)). It did not reach petitioner's contention on the merits that summary judgment should have been granted in his favor. The court found that petitioner had "surrendered his citizenship pursuant to a valid decree to the entry of which he consented" (Pet. App. 14a) and that he

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[2]Although petitioner did assert in his response to the government's motion to dismiss the appeal that the consent was invalid because the possibility of an extended trial and other circumstances induced him to surrender his citizenship, he did not contend on appeal that the consent was invalid. (See Pet. 11-12).

had not claimed that "either he or his attorneys were under any disability when they signed the decree" (*ibid.*). Accordingly, the court held that the issues presented in the summary judgment motion were no longer appealable (*ibid.*).

2. The court of appeals' decision is correct, and petitioner raises no issue warranting review by this Court. His argument (Pet. 10-14) that his consent was somehow invalid because he "received no benefit from the entry of judgment" (Pet. 12) was not raised in either the district court or the court of appeals. Moreover, the argument is without merit. Petitioner decided on his own to surrender his certificate of naturalization. He never asked for any "benefit" in return for consenting to judgment against him, and no promises of any kind were made to him. At no time did he or his counsel express any reservation or condition to the district court; to the contrary, his attorney agreed that entry of the judgment "totally disposes of [the] case" (C.A. App. 478). In any event, petitioner plainly received the benefit of sparing himself the expense and ordeal of a trial (see Pet. 11-12).[3]

The court of appeals correctly held that the district court's summary judgment order cannot be contested on appeal in light of petitioner's subsequent and voluntary consent to final judgment against him. Petitioner could have preserved this issue for appellate review by litigating the issue at trial (as indeed the district court invited him to do when it denied summary judgment (C.A. App. 28)), but he chose not to do so.[4]

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[3]Petitioner's claim (Pet. 10-11) that the court of appeals rejected "sub silentio" the government's argument that the judgment was a consent judgment is totally without foundation.

[4]Presumably, petitioner could have preserved the issue for appeal, while saving himself the burden of a protracted trial, by stipulating to the facts that the government would have proved at trial.

3. In any event, the district court was plainly correct in denying summary judgment. Even assuming arguendo that the standards for a criminal prosecution would apply to this civil proceeding, the court's holding that a claim of denial of due process based on pre-accusation delay requires proof of "actual and substantial prejudice" caused by "purposeful or oppressive delay by the government" (C.A. App. 26) is fully in accord with the decisions of this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977); *United States* v. *Marion*, 404 U.S. 307, 325-326 (1971). See also *Costello* v. *United States*, 365 U.S. 265, 283-284 (1961). On the basis of an extensive record, the district court concluded that "[t]he present case is not one in which there has been no tenable reason advanced [by the government] for delay" (C.A. App. 27),[5] and therefore that there was no basis for summary judgment in favor of petitioner. Petitioner's consent to judgment, of course, precluded the district court from a fuller consideration of the issue at trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1982

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[5]Petitioner incorrectly states (Pet. 14) that it is "without dispute" that the government intentionally avoided the filing of a complaint "until it rendered [petitioner] unable to defend himself." In fact, the district court specifically found that both the reasons for delay and the existence of prejudice "are in dispute" (C.A. App. 27).

DOJ-1982-04